



California Fair Political Practices Commission

March 10, 1987

Patricia G. Tilley
Administrative Advisor II
Department of Conservation
1416 Ninth Street
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. No. 87-047

Dear Ms. Tilley:

You have requested advice concerning the conflict of interest provisions of the Political Reform Act (the "Act").^{1/}

QUESTION

Must members of the Beverage Container Recycling Advisory Committee be included in the Department of Conservation's conflict of interest code?

CONCLUSION

Members of the Beverage Container Recycling Advisory Committee must be included in the Department of Conservation's conflict of interest code.

FACTS

In 1986, the Legislature adopted AB 2020, the California Beverage Container and Litter Reduction Recycling Act.^{2/} The bill contains provisions for the certification of recycling

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Administrative Code Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Administrative Code.

^{2/} AB 2020 was carried by Assemblyman Burt Margolin, the former employer of our General Counsel, Diane Griffiths. As I indicated in a previous letter, Ms. Griffiths has not participated in preparation or approval of this advice letter.

centers, processors, and nonprofit drop-off programs. The bill also creates the Beverage Container Recycling Advisory Committee (committee) to advise the Director of the Department of Conservation on beverage container recycling.

The committee's responsibilities include advising the director on all matters concerning the recycling of beverage containers, and reviewing and commenting on certain proposed regulations. (Public Resources Code Sections 14531 and 14536(c).) The bill specifies that the members shall be considered "public officials" for purposes of Chapter 7 of the Political Reform Act.

ANALYSIS

Conflict of interest codes are required to identify "designated employees" and to require that those designated positions file appropriate financial disclosure statements. (Section 87302.) The term "designated employee" excludes "... any unsalaried member of any board or commission which serves a solely advisory function."

Regulation 18700 provides guidance in determining whether a board or commission is "solely advisory" or has decision-making authority. It provides in pertinent part:

(a) "Public official at any level of state or local government" means every natural person who is a member, officer, employee or consultant of a state or local government agency.

(1) "Member" shall include, but not be limited to, salaried or unsalaried members of boards or commissions with decision-making authority. A board or commission possesses decision-making authority whenever:

(A) It may make a final governmental decision;

(B) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto which may not be overridden; or

(C) It makes substantive recommendations which are, and over an extended period of time have been, regularly

approved without significant amendment or modification by another public official or governmental agency.

Regulation 18700(a)(1)(A), (B)
and (C).

In the present situation, it does not appear that the committee may make final governmental decisions or compel or prevent governmental decisions. In addition, the committee has no track record upon which to determine the extent to which its recommendations will be followed. However, the Legislature has expressly provided:

The members of the committee are public officials for purposes of, and are subject to, Chapter 7 (commencing with Section 87100) of Title 9 of the Government Code, including, but not limited to, Article 2 (commencing with Section 87200) of that chapter.

(Public Resources Code Section
14533.)
(Emphasis added.)

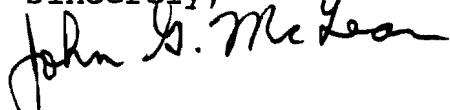
Chapter 7 of Title 9 of the Government Code contains the disclosure and disqualification provisions of the Act. The disclosure provisions of Sections 87200, et seq., would not apply to the committee members if they did not possess decision-making authority. We believe the Legislature's express provision that members of the committee are subject to those provisions indicates the Legislature's belief that the committee's recommendations will have sufficient impact for the committee to be considered to possess decision-making authority. Accordingly, we conclude that members of the committee must be included in the Department of Conservation's conflict of interest code.^{3/}

^{3/} We have previously advised that members of an advisory group with no track record may be designated employees who must be included in an agency's conflict of interest code. (See, e.g., Gross Advice Letter (No. A-83-028); copy enclosed.)

Patricia G. Tilley
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If you have any questions, please contact me at
(916) 322-5901.

Sincerely,

A handwritten signature in cursive script that reads "John G. McLean". The signature is written in dark ink and is positioned above the printed name.

John G. McLean
Counsel, Legal Division

JGM:plh
Enclosure

DEPARTMENT OF CONSERVATION

DIVISION OF ADMINISTRATION
DIVISION OF MINES AND GEOLOGY
DIVISION OF OIL AND GAS
Division of Recycling
Office of Legal Services



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1416 Ninth Street
SACRAMENTO, CA 95814
(916) 323-3743

February 2, 1987

Mr. John G. McLean
Counsel, Legal Division
Fair Political Practices
Commission
428 "J" Street, Suite 800
Sacramento, CA 95804

Dear John;

I was asked to advise the Director of Department of Conservation as to whether members of the Beverage Container Recycling Advisory Committee (created by Public Resources Code section 14531) should be covered as designated employees by the Department's conflict of interest code. The attached memorandum represents my conclusions based on my review of Fair Political Practices Commission's advisory letters and our telephone discussions on January 28, 1987.

Please advise me if your review of the attached causes you to draw any different conclusion.

You have been very helpful. Thank you, again, for taking the time to assist me.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Patricia G. Tilley".

PATRICIA G. TILLEY, Esq.
Administrative Advisor II

PGT:cr

cc: R.M. Ward

Memorandum

To : Randall M. Ward
Director

Date : January 29, 1987
Subject: Conflict of
Interest Code
Coverage for
Advisory
Committee Members

From : Department of Conservation—Division of Administration

Yesterday, Leon asked me to prepare a letter to the Fair Political Practices Commission (FPPC) for your signature requesting that the Beverage Container Recycling Advisory Committee Members be excluded from coverage as designated employees by the Department's Conflict of Interest Code.

I spoke with Mr. John McLean, Counsel, Legal Division of FPPC and reviewed two of their advisory letters (FPPC file number A-86-234, 8/15/86 and 11/18/86) on the subject. It is FPPC's position that unless the government official's position entails governmental decision-making, either directly, by delegation, or by participation through recommendation, there is no need to cover the position in a conflict of interest code. (Government Code Sections 82019 and 87302(a).) Therefore, the fundamental question to be determined in each instance is whether the body in question (the Board, Committee or Commission) makes decisions or makes recommendations which are followed on a regular basis without substantial modification.

The Beverage Container Recycling Advisory Committee (Committee) is "solely advisory". The Committee must meet at the call of the Division Chief and must advise him/her on all matters concerning the recycling of beverage containers. Although the Division of Recycling may not adopt regulations until those regulations have been submitted to the Committee for review and comments, the Committee's recommendations are not binding on the Division. The Division is free to adopt some, all, or none of the recommendations at its discretion. Moreover, if the Division refuses to approve the recommendations of the Committee, that refusal cannot be appealed to any governmental agency or judicial body, or otherwise be reviewed.

Under these circumstances it is clear that the Committee does not make final governmental decisions, does not have the power to compel governmental decisions, and cannot prevent such decisions

Randall M. Ward
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January 29, 1987

within the meaning of 2 California Administrative Code 18700(a)(1) (the regulation adopted by FPFC to make specific the meaning of "decision-making authority".)

If over a period of time, the Committee's recommendations appear to be "rubber stamped", that is followed on a regular and on-going basis without any significant amendment or modification, the Committee could then be considered to possess decision-making authority. Since the Committee has no history to evaluate in this regard, the Department can consider the Committee "solely advisory" and reevaluate the Committee's decision-making authority at a future date.

Mr. McLean states that the Department may simply exclude Committee members from coverage as designated employees under the Department's Conflict of Interest Code. No letter requesting FPFC's permission is required. All that is required is that the Department have legal justification for doing so. This memo should meet that requirement.

I will be happy to prepare a letter to FPFC for your signature if you still feel that one is necessary. Please advise me.

Patricia G. Tilley
Administrative Adviser

PGT:ny



California Fair Political Practices Commission

February 9, 1987

Patricia G. Tilley
Administrative Advisor II
Department of Conservation
1416 Ninth Street
Sacramento, CA 95814

Re: Advice Letter No. 87-047

Dear Pat,

Your letter and memorandum regarding "Conflict of Interest Code Coverage for Advisory Committee Members" were received on February 5, 1987 by the Fair Political Practices Commission. As I indicated on the telephone, I was not aware at the time of our discussion that AB 2020 which created the Beverage Container Recycling Advisory Committee expressly provides that members of the committee are "public officials" subject to the provisions of the Political Reform Act.^{1/} In light of this provision, we believe this issue requires further study and analysis. Accordingly, it is our intention to treat your letter as a request for advice.

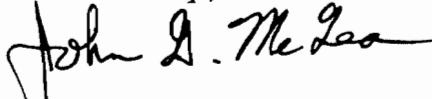
Please note that our General Counsel, Diane Griffiths, would normally be responsible for approving the response. However, this advice concerns AB 2020, which was carried by Assemblyman Burt Margolin, her former employer. Therefore, she has referred the matter to Robert Leidigh, the senior attorney in our Legal Division for processing and approval. Ms. Griffiths will not participate in preparation or approval of the advice letter.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days. You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Patricia G. Tilley
February 9, 1987
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If you have any questions, please contact me at
(916) 322-5901.

Sincerely,

A handwritten signature in cursive script, reading "John G. McLean". The signature is written in dark ink and is positioned above the typed name.

John G. McLean
Counsel, Legal Division

JGM:plh

1/ Government Code Sections 81000-91015.